



Reprinted  
April 7, 2009

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## ENGROSSED HOUSE BILL No. 1040

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DIGEST OF HB 1040 (Updated April 6, 2009 1:57 pm - DI 51)

**Citations Affected:** IC 29-3; IC 30-4; IC 34-30.

**Synopsis:** Trusts and fiduciaries. Specifies a guardian's powers concerning the estate planning of a protected person. Provides that unless a trust document provides otherwise, a trustee does not have the following duties under the Indiana uniform prudent investor act with respect to the acquisition or retention of any contract of life insurance: (1) a duty to determine whether a contract of insurance is or remains a proper investment; (2) a duty to exercise policy options, including investment options, available under a contract of insurance; or (3) a duty to diversify if a contract of insurance is the sole or a major asset of a trust. Repeals the statute limiting a guardian's power to engage in estate planning for a protected person to the part of the guardianship estate that is required for the protected person's future support or the future support of the protected person's dependents during the lifetime of the protected person. (The introduced version of this bill was prepared by the probate code study commission.)

**Effective:** July 1, 2009.

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**Van Haaften, Foley**  
(SENATE SPONSORS — ZAKAS, BRODEN)

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January 7, 2009, read first time and referred to Committee on Judiciary.  
February 5, 2009, reported — Do Pass.  
February 9, 2009, read second time, ordered engrossed. Engrossed.  
February 12, 2009, read third time, passed. Yeas 92, nays 0.

SENATE ACTION

February 19, 2009, read first time and referred to Committee on Judiciary.  
March 26, 2009, amended, reported favorably — Do Pass.  
April 6, 2009, read second time, amended, ordered engrossed.

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First Regular Session 116th General Assembly (2009)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2008 Regular Session of the General Assembly.

## ENGROSSED HOUSE BILL No. 1040

A BILL FOR AN ACT to amend the Indiana Code concerning probate.

*Be it enacted by the General Assembly of the State of Indiana:*

1 SECTION 1. IC 29-3-9-4.5 IS ADDED TO THE INDIANA CODE  
2 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY  
3 1, 2009]: **Sec. 4.5. (a) After notice to interested persons and upon**  
4 **authorization of the court, a guardian may, if the protected person**  
5 **has been found by the court to lack testamentary capacity, do any**  
6 **of the following:**

7 (1) **Make gifts, in accordance with the protected person's**  
8 **wishes.**

9 (2) **Convey, release, or disclaim contingent and expectant**  
10 **interests in property, including marital property rights and**  
11 **any right of survivorship incident to joint tenancy or tenancy**  
12 **by the entireties.**

13 (3) **Exercise or release a power of appointment.**

14 (4) **Create a revocable or irrevocable trust of all or part of the**  
15 **property of the estate, including a trust that extends beyond**  
16 **the duration of the guardianship.**

17 (5) **Revoke or amend a trust that is revocable by the protected**

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person.

(6) Exercise rights to elect options and change beneficiaries under insurance policies, retirement plans, and annuities.

(7) Surrender an insurance policy or annuity for its cash value.

(8) Exercise any right to an elective share in the estate of the protected person's deceased spouse.

(9) Renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos.

(b) Before approving a guardian's exercise of a power listed in subsection (a), the court shall consider primarily the decision that the protected person would have made, to the extent that the decision of the protected person can be ascertained. If the protected person has a will, the protected person's distribution of assets under the will is prima facie evidence of the protected person's intent. The court shall also consider:

(1) the financial needs of the protected person and the needs of individuals who are dependent on the protected person for support;

(2) the interests of creditors;

(3) the possible reduction of income taxes, estate taxes, inheritance taxes, or other federal, state, or local tax liabilities;

(4) the eligibility of the protected person for governmental assistance;

(5) the protected person's previous pattern of giving or level of support;

(6) the protected person's existing estate plan, if any;

(7) the protected person's life expectancy and the probability that the guardianship will terminate before the protected person's death; and

(8) any other factor the court considers relevant.

(c) A guardian may examine and receive, at the expense of the guardian, copies of the following documents of the protected person:

(1) A will.

(2) A trust.

(3) A power of attorney.

(4) A health care appointment.

(5) Any other estate planning document.

SECTION 2. IC 30-4-3.5-1, AS AMENDED BY P.L.61-2008, SECTION 14, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE

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JULY 1, 2009]: Sec. 1. (a) Except as otherwise provided in ~~subsection~~  
**subsections (b) and (d)**, a trustee who invests and manages trust assets  
 owes a duty to the beneficiaries of the trust to comply with the prudent  
 investor rule set forth in this chapter.

(b) The prudent investor rule, a default rule, may be expanded,  
 restricted, eliminated, or otherwise altered by the provisions of a trust.  
 A trustee is not liable to a beneficiary to the extent that the trustee  
 acted in reasonable reliance on the provision of the trust.

(c) This chapter applies to a trustee or escrow agent, acting as  
 fiduciary, of:

(1) a perpetual care fund or an endowment care fund established  
 under IC 23-14-48-2;

(2) a prepaid funeral plan or funeral trust established under  
 IC 30-2-9;

(3) a funeral trust established under IC 30-2-10; or

(4) a trust or escrow account created from payments of funeral,  
 burial services, or merchandise in advance of need, as described  
 in IC 30-2-13.

**(d) Except as provided in subsections (e) and (f), the duties of a  
 trustee with respect to the acquisition or retention of any contract  
 of insurance on the life or lives of a settlor or a settlor's spouse, or  
 both, do not include the following:**

**(1) A duty to determine whether a contract of insurance is or  
 remains a proper investment.**

**(2) A duty to exercise policy options, including investment  
 options, available under a contract of insurance.**

**(3) A duty to diversify if a contract of insurance is the sole or  
 a major asset of a trust.**

**A trustee is not liable to any person for not determining whether  
 a contract of insurance is or remains a proper investment, for not  
 exercising policy options, including investment options, available  
 under a contract of insurance, or for not diversifying a trust in  
 which a contract of insurance is the sole or a major asset of the  
 trust.**

**(e) With respect to a trust established before July 1, 2009,  
 subsection (d) applies to the trust only if a trust settlor is still living  
 and:**

**(1) the trustee of the trust notifies the settlor in writing that  
 subsection (d) will apply to the trust unless the settlor  
 provides to the trustee, less than sixty (60) days after the  
 settlor receives the trustee's notice under this subdivision, a  
 written objection to the application of subsection (d) to the**

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trust; and

(2) the settlor does not provide to the trustee, less than sixty (60) days after the settlor receives the trustee's notice under subdivision (1), a written objection to the application of subsection (d) to the trust.

(f) The exclusion of a particular duty under subsection (d) does not:

(1) apply to a trustee if the trust administered by the trustee specifically provides that the trustee has that duty; or

(2) create any duty or any liability to a trust beneficiary on the part of the insurance company or its representatives involved in the issuance of a contract of insurance.

SECTION 3. IC 34-30-2-131, AS AMENDED BY P.L.238-2005, SECTION 58, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 131. (a) IC 30-4-3-1.5 (Concerning actions of a trustee who does not know that a trust has been revoked or amended).

(b) IC 30-4-3-6.5 (Concerning actions of a trustee who does not know of the happening of an event that affects the trust).

(c) IC 30-4-3-11 (Concerning trustees and beneficiaries of a trust in certain circumstances).

**(d) IC 30-4-3.5-1(d) (Concerning trustees and life insurance contracts).**

SECTION 4. IC 29-3-9-4 IS REPEALED [EFFECTIVE JULY 1, 2009].

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## COMMITTEE REPORT

Mr. Speaker: Your Committee on Judiciary, to which was referred House Bill 1040, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill do pass.

LAWSON L, Chair

Committee Vote: yeas 9, nays 0.

## COMMITTEE REPORT

Madam President: The Senate Committee on Judiciary, to which was referred House Bill No. 1040, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 1, line 4, after "may" insert "**, if the protected person has been found by the court to lack testamentary capacity,**".

Page 2, line 11, after "ascertained." insert "**If the protected person has a will, the protected person's distribution of assets under the will is prima facie evidence of the protected person's intent.**".

and when so amended that said bill do pass.

(Reference is to HB 1040 as printed February 6, 2009.)

BRAY, Chairperson

Committee Vote: Yeas 6, Nays 0.

## SENATE MOTION

Madam President: I move that Engrossed House Bill 1040 be amended to read as follows:

Page 2, between lines 40 and 41, begin a new paragraph and insert:

"SECTION 2. IC 30-4-3.5-1, AS AMENDED BY P.L.61-2008, SECTION 14, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 1. (a) Except as otherwise provided in ~~subsection~~ **subsections (b) and (d)**, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this chapter.

(b) The prudent investor rule, a default rule, may be expanded,

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restricted, eliminated, or otherwise altered by the provisions of a trust. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provision of the trust.

(c) This chapter applies to a trustee or escrow agent, acting as fiduciary, of:

- (1) a perpetual care fund or an endowment care fund established under IC 23-14-48-2;
- (2) a prepaid funeral plan or funeral trust established under IC 30-2-9;
- (3) a funeral trust established under IC 30-2-10; or
- (4) a trust or escrow account created from payments of funeral, burial services, or merchandise in advance of need, as described in IC 30-2-13.

**(d) Except as provided in subsections (e) and (f), the duties of a trustee with respect to the acquisition or retention of any contract of insurance on the life or lives of a settlor or a settlor's spouse, or both, do not include the following:**

- (1) A duty to determine whether a contract of insurance is or remains a proper investment.**
- (2) A duty to exercise policy options, including investment options, available under a contract of insurance.**
- (3) A duty to diversify if a contract of insurance is the sole or a major asset of a trust.**

**A trustee is not liable to any person for not determining whether a contract of insurance is or remains a proper investment, for not exercising policy options, including investment options, available under a contract of insurance, or for not diversifying a trust in which a contract of insurance is the sole or a major asset of the trust.**

**(e) With respect to a trust established before July 1, 2009, subsection (d) applies to the trust only if a trust settlor is still living and:**

- (1) the trustee of the trust notifies the settlor in writing that subsection (d) will apply to the trust unless the settlor provides to the trustee, less than sixty (60) days after the settlor receives the trustee's notice under this subdivision, a written objection to the application of subsection (d) to the trust; and**
- (2) the settlor does not provide to the trustee, less than sixty (60) days after the settlor receives the trustee's notice under subdivision (1), a written objection to the application of subsection (d) to the trust.**

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**(f) The exclusion of a particular duty under subsection (d) does not:**

- (1) apply to a trustee if the trust administered by the trustee specifically provides that the trustee has that duty; or**
- (2) create any duty or any liability to a trust beneficiary on the part of the insurance company or its representatives involved in the issuance of a contract of insurance.**

SECTION 3. IC 34-30-2-131, AS AMENDED BY P.L.238-2005, SECTION 58, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2009]: Sec. 131. (a) IC 30-4-3-1.5 (Concerning actions of a trustee who does not know that a trust has been revoked or amended).

(b) IC 30-4-3-6.5 (Concerning actions of a trustee who does not know of the happening of an event that affects the trust).

(c) IC 30-4-3-11 (Concerning trustees and beneficiaries of a trust in certain circumstances).

**(d) IC 30-4-3.5-1(d) (Concerning trustees and life insurance contracts).".**

Renumber all SECTIONS consecutively.

(Reference is to EHB 1040 as printed March 27, 2009.)

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